

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1043

United States Court of Appeals

For the Second Circuit.

RICHARD A. GORDON, etc.,

Plaintiffs-Appellants,

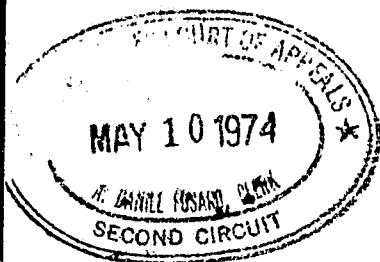
-against-

NEW YORK STOCK EXCHANGE, et. al.,

Defendants-Appellees.

*Appeal from the United States District Court
for the Southern District of New York*

APPELLANTS' REPLY BRIEF



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TABLE OF CASES

	<u>Page</u>
<u>Lomartira vs. American Arts Insurance Company</u> , 245 Fed. Supp. 124, aff'd 371 Fed.(2nd) 550.	4
<u>Conley vs. Gibson</u> , 355 US 41	4
<u>A.T. Brod & Co. vs. Perlow</u> , 375 Fed.(2nd) 393.	4
<u>Dioguardi vs. Durning</u> , 139 Fed.(2nd) 774.	4
<u>Food Basket, Inc. vs. Albertson's, Inc.</u> 383 Fed.(2nd) 785	5
<u>Levin vs. Joint Commission on Accreditation of Hospitals</u> , 354 Fed.(2nd) 515	5
<u>Peter J. Allen Corp. vs. California Furniture Shops, Limited</u> , 344 Fed. Supp. 437	5

STATUTES CITED

Sections 1 & 2 Sherman Act	2
Section 2a Clayton Act	2

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For the first time in these lengthy proceedings, the defendants now claim that the original Complaint was not a broad-based attack on the various stock exchanges practices as violative of the anti-trust laws, but now claim that the plaintiffs only challenged certain specific "surcharges" and "discounts" as violative of the Robinson-Patman Act. This claim, of course, does not lie in accordance with the facts but, since it is being made, plaintiffs believe that it should be commented upon.

It is axiomatic, of course, in pleading questions, that a pleading must be given the broadest possible interpretation consistent with the facts involved and, as specifically provided in Rule 8(f) FRCP:

" Pleadings shall be construed so as to do substantial justice."

The Complaint herein is broad enough to constitute a broad-based attack on the practices of the defendant exchanges in mandating fixed commission rates and permitting negotiated commission rates only above a certain level of trade. The Complaint not only so alleged but the District Judge, the plaintiffs and the defendants consistently [up to the present time] so interpreted the Complaint. The affidavits submitted on the Motion for Summary Judgment also met this question.

Specifically, the anti-trust laws pleaded as being violated by the practices involved were Sections 1 and 2 of the Sherman Act and Section 2a of the Clayton Act [the Robinson-Patman Act]. Paragraphs THIRTEENTH, FOURTEENTH, FIFTEENTH, SEVENTEENTH, EIGHTEENTH, and NINETEENTH of the Complaint all broadly attack the question of fixed commission rates. Obviously if the plaintiffs contend that the opportunity to negotiate

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stock commission rates must be extended to all customers, large or small, then by reason thereof, the failure to do so (by imposing fixed commission rates on "small trades" is being attacked as a violation). The Complaint further alleges (paragraph TWENTIETH (a)) that the plaintiffs, and the other Class members, have overpaid Commissions by reason of the fixed Commission rates involved.

Further proof that the present pleadings consisted of a "broad based attack" on the fixed commission rates charged by the New York Stock Exchange is seen in the affidavits submitted both in support and in opposition to the Motion for Summary Judgment.

The Defendants' Statement pursuant to Rule 9(g) [paragraph 5] reads in part as follows:

" Since registering with the SEC in 1934 the NYSE and the Amex have changed their respective constitutional provisions and rules prescribing minimum commission rates a number of times * * *(emphasis supplied)"

The Opposing Affidavit of I. WALTON BADER sets forth one of the issues as :

"* * * a- The Rules of the defendant Stock Exchanges which set minimum commission charges and provide penalties for borkers charging less than the stipulated minimums (although charges in excess of the minimums are permitted.* * *"

The Opposing affidavit of RICHARD A. GORDON
(Appendix pages 329-337) states, on page 334 that :

" * * * At least one broker has told me that he would be pleased to give me a discount from the fixed rates of commission but is not permitted to do so by the Rules of the respective stock exchanges and, if he did, he would be suspended from trading on the said stock exchange. * * *"

The Decision of the District Court (Appendix pages 340-355) also meets this issue. On Page 344 of the opinion the District Judge states:

"* * * Plaintiffs' remaining claims relating to the commission rate structure of the Exchanges pose the question whether the Exchanges, subject to SEC supervision, can fix commission rates without incurring Sherman Act liability* * *"

The Rule is clear, in the light of the above, that the issue with respect to the legality of fixed commission rates was fully considered on the Motion for Summary Judgment and therefore the issues involved were fully raised before the Court below.

Controversies, of course, are to be decided on the merits on not on technicality. See, for example, Lomartira vs. American Arts Insurance Company, 245 Fed. Supp. 124, aff'd 371 Fed.(2nd) 550; Conley vs. Gibson, 355 US 41; A.T. Brod & Co. vs. Perlow, 375 Fed(2nd) 393 and Dioguardi vs. Durning, 139 Fed(2nd) 774.

Indeed, under the facts of this case, the legality of fixed commission rates would have to be considered even if the issue was not even raised by the pleadings in view of the conduct of the proceedings in this case. See, for example, Food Basket, Inc. vs. Albertson's, Inc., 383 Fed(2nd) 785; Levin vs. Joint Commission on Accreditation of Hospitals, 354 Fed.(2nd) 515 and Peter J. Allen Corp. vs. California Furniture Shops, Limited 344 Fed. Supp. 437.

The defendants further contend that the plaintiffs conceded that there were no issues of fact in this suit and therefore the claim now raised in this appeal to the effect that there were such factual issues is misplaced. In the opposing affidavit of Richard A. Gordon (Appendix 329-337) on page 337 Mr. Gordon states

"* * * I therefore submit that, in this case, there are triable issues of fact that require a trial * * *"

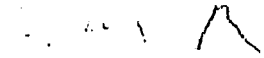
In the opposing affirmation of I. WALTON BADER (Appendix 325-328) there appears on page 326 the following quotation:

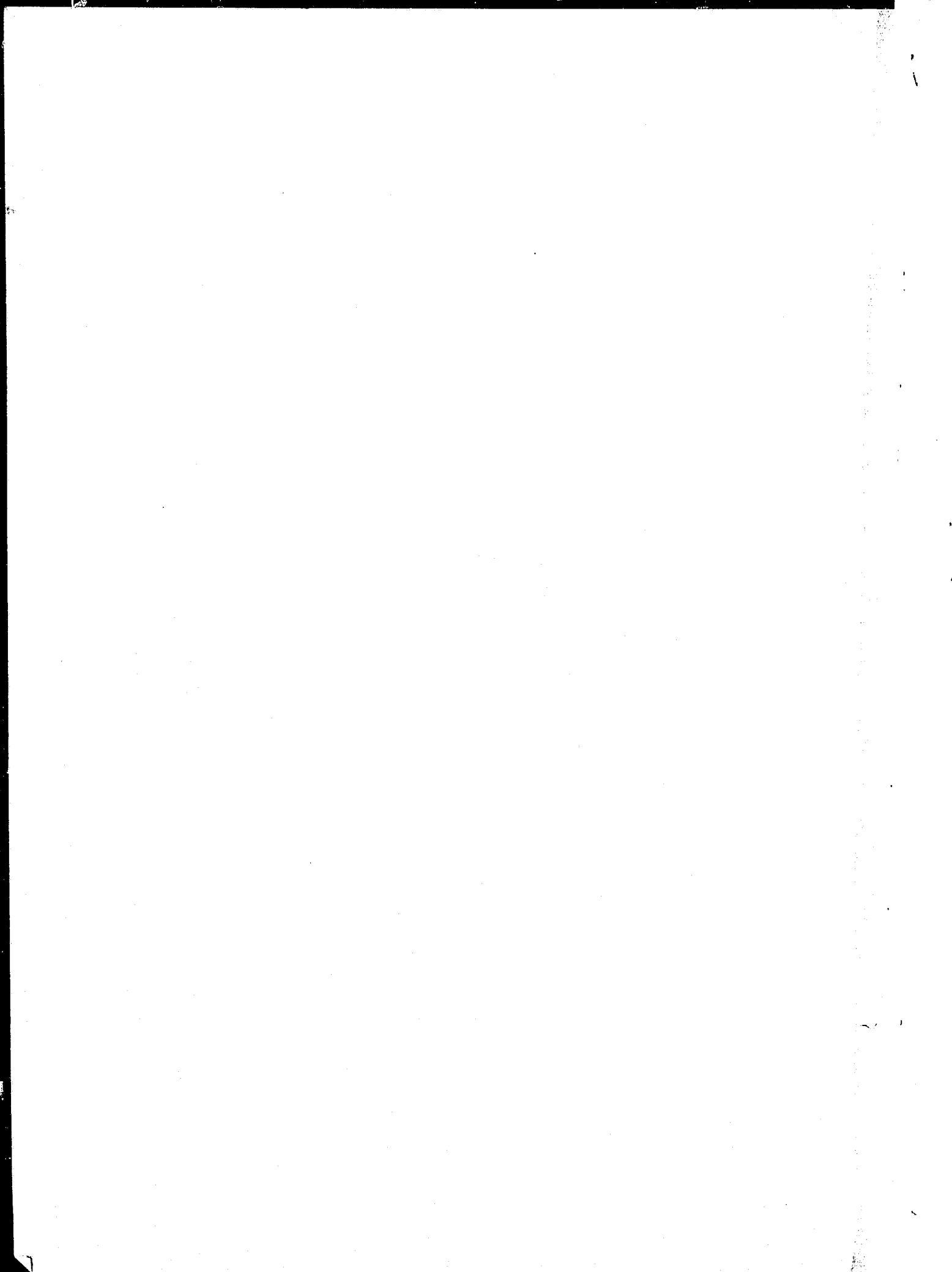
"* * * This being a motion for Summary Judgment all that the plaintiff need show is a 'triable issue of fact'. It is not necessary on this motion, to prove that the questioned practices are in violation of law. * * *"

The affirmation then goes on to list the questioned practices and the reasons why they constitute a law violation.

In the light of the foregoing it is obvious that the issues raised in this appeal were fully considered below, the plaintiffs are not raising any new issues in this appeal and the case should be considered on the merits.

Respectfully submitted,


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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK

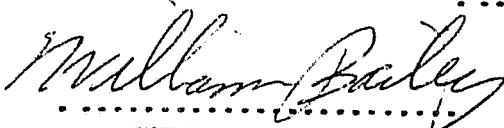
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10502. That on the 10 day of May, 1974 at No. Foley St. N.Y.C. deponent served the within ~~Police~~ upon ~~N.Y. Attorney~~ the ~~appellee~~ herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the ~~appellee~~ therein.

Sworn to before me,

this 10 day of May 1974


Edward Bailey


.....

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1973

I Edward Bailey duly sworn and says and of
18 years of age mailed 3 original copies to
Seymour H. Dussman Esq.
Dept of Justice
Anti Trust Division
Washington D.C. 20530

Edward Bailey

STATE OF NEW YORK

COUNTY OF N.Y. } ss.

May 10. 1974
Saul Birnbaum

SAUL BIRNBAUM
Notary Public, State of New York
No. 24-5325750
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976